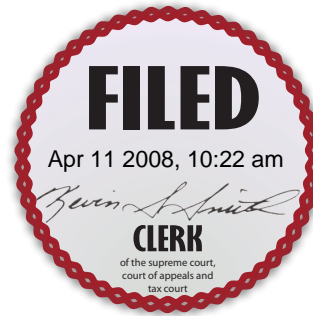


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

STEPHEN LEE BAILEY,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 48A02-0710-CR-857

APPEAL FROM THE MADISON SUPERIOR COURT
The Honorable Thomas Newman, Jr., Judge
Cause No.48D03-0307-FC-276

April 11, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

Stephen Bailey appeals after his probation was revoked and he was ordered to execute his six-year sentence at the Indiana Department of Correction (“DOC”). For our review, Bailey raises two issues: whether the trial court properly ordered that his sentence in this case be served consecutively to another sentence he was serving and whether the trial court properly ordered that he serve his sentence at the DOC. Concluding that Bailey cannot raise an issue regarding his underlying sentence in this appeal from revocation of his probation and that the trial court did not abuse its discretion in ordering that he serve his sentence at the DOC, we affirm.

Facts and Procedural History

On September 22, 2003, Bailey entered a plea of guilty to operating a vehicle after a lifetime suspension, a Class C felony, and was sentenced to the DOC “for a period of 6 years, with 2 years to be executed on in-home detention and balance of said sentence to be suspended. Sentence to be served consecutive to sentence defendant is currently serving in DOC.” Appellant’s Appendix at 9. Bailey was placed on probation for a period of four years under the usual and ordinary conditions of probation. On November 10, 2005, the Madison County probation department filed a request for clarification “regarding the Court’s position about the sentence in this cause, and if it is to run consecutive or concurrent to Wayne County cause number 89D02-0304-FD-30.” Id. at 12. On December 6, 2005, the court issued a finding that the “sentence shall be served consecutive to sentence imposed in 89D02-0304-FD-30.” Id. at 3.

On June 8, 2006, a notice of violation of probation was filed alleging that Bailey had been charged in two separate causes with new criminal offenses; namely, theft and being an habitual substance offender for acts occurring on April 11, 2006, and burglary, theft, and being an habitual offender for acts occurring on May 21, 2006. Following a hearing, the trial court entered an order on violation of probation, finding by a preponderance of the evidence that Bailey had violated the conditions of his probation by committing the offense of theft on April 11, 2006, and the offenses of burglary and theft on May 21, 2006. Bailey's probation was revoked and the court ordered that Bailey serve his sentence at the DOC. Bailey now appeals.

Discussion and Decision¹

I. Consecutive Sentencing

Bailey first alleges that the trial court "inappropriately modified his original sentence on December 6, 2005," when it clarified that Bailey's sentence in this case was to be served consecutive to a sentence he was serving out of Wayne County.

Bailey's argument is a challenge to the propriety of his underlying sentence. However, Bailey did not initiate a timely appeal of his sentence at the time it was ordered or at the time it was allegedly modified in December of 2005, nor did he request permission to file a belated notice of appeal. See Ind. Appellate Rule 9(A)(1); Ind. Post-Conviction Rule

¹ Bailey tendered an untimely pro se Reply to Appellee Brief and a letter explaining that a mix-up in the mailroom at the New Castle Correctional Facility caused the reply to be untimely. We are not accepting Bailey's reply for filing not because it was late but because Bailey is represented by counsel on appeal and, according to our docket, his counsel has not withdrawn his appearance. We do not entertain pro se pleadings when counsel is involved in a case. Morse v. State, 593 N.E.2d 194, 197 (Ind. 1992).

2(1). A defendant may not collaterally challenge his sentence on appeal from a probation revocation. Stephens v. State, 818 N.E.2d 936, 939 (Ind. 2004). Accordingly, we decline to review Bailey's argument regarding the trial court's order of consecutive sentences.

II. Probation Revocation

Bailey also alleges that the trial court abused its discretion when, upon revoking his probation, it ordered that he execute his sentence at the DOC rather than in an alternative placement.

Indiana Code section 35-38-2-3(g) provides:

If the court finds that the person has violated a condition at any time before termination of the period, and the petition to revoke is filed within the probationary period, the court may:

- (1) continue the person on probation, with or without modifying or enlarging the conditions;
- (2) extend the person's probationary period for not more than one (1) year beyond the original probationary period; or
- (3) order execution of all or part of the sentence that was suspended at the time of initial sentencing.

We review a trial court's sentencing decision in a probation revocation proceeding for an abuse of discretion. Abernathy v. State, 852 N.E.2d 1016, 1020 (Ind. Ct. App. 2006). An abuse of discretion occurs if the trial court's decision is against the logic and effect of the facts and circumstances before the court. Id. Generally speaking, as long as the trial court follows the procedures outlined in Indiana Code section 35-38-2-3, the trial court may properly order execution of a suspended sentence. Id.

Bailey contends that because he had not yet begun serving his sentence,² he should have been given the opportunity for home detention. The “[c]onsideration and imposition of any alternatives to incarceration is a ‘matter of grace’ left to the discretion of the trial court.” Monday v. State, 671 N.E.2d 467, 469 (Ind. Ct. App. 1996). Bailey was on parole for one cause but had not yet begun serving home detention for this cause when the notice of probation violation was filed. The trial court found by a preponderance of the evidence that Bailey had committed several new criminal offenses, including participating in shoplifting and breaking into and stealing from someone’s garage. Bailey was not entitled to serve his sentence in home detention in the first place, as placement in a community corrections program is a “conditional liberty that is a favor, not a right.” Million v. State, 646 N.E.2d 998, 1002 (Ind. Ct. App. 1995). The trial court did not abuse its discretion in deciding that Bailey should not be afforded such a favor upon violating the conditions of his probation.

Conclusion

Bailey has not properly raised an issue regarding his underlying sentence and the trial court did not abuse its discretion in revoking his probation and ordering that he execute his sentence in the DOC. The judgment of the trial court is affirmed.

Affirmed.

FRIEDLANDER, J., and MATHIAS, J., concur.

² A defendant can violate his probation prospectively. Gardner v. State, 678 N.E.2d 398, 401 (Ind. Ct. App. 1997). See Ashba v. State, 570 N.E.2d 937, 939-40 (Ind. Ct. App. 1991) (holding that a defendant who was on parole from the DOC but not yet on probation could violate his probation prospectively), aff’d, 580 N.E.2d 244 (Ind. 1991), cert. denied, 503 U.S. 1007 (1992).

